

# The UN Committee of 24's dogmatic philosophy of recognition

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# The UN Committee of 24's Dogmatic Philosophy of Recognition: Toward a Sui Generis Approach to Decolonization

*'What we need now are creative solutions for the remaining Non-Self-Governing Territories. If the United Nations is to fulfil its obligations in supporting the legitimate aspirations of the peoples of these Territories, a pragmatic and realistic approach- taking into account the specific circumstances of each- is most likely to lead to concrete results.'* - **Ban Ki-Moon, former UN Secretary General**<sup>1</sup>

## **Abstract:**

*The time is ripe for the United Nations Special Committee on Decolonization (the Committee of 24) to accept sui generis categories to enable it to achieve its aim of 'finishing the job' of decolonization. This would mean a departure from the Committee of 24's rigid adherence to the three forms of decolonization recognised by it - independence, integration and free association. This article adopts Gilles Deleuze's critiques of the 'dogmatic philosophy of recognition' and how this can be overcome through his articulation of 'the Encounter' to interrogate the philosophical basis of the Committee of 24's inability to recognise sui generis forms of decolonization. It is through the Encounter that the rigid adherence to the categories is challenged such that sui generis categories are created in furtherance of the Committee's stated aim. In applying this theoretical analysis, the article uses Gibraltar as a nascent example of what a sui generis category of decolonization could look like.*

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<sup>1</sup> UN General Assembly, 'Secretary General Hails 2010 as Landmark Year for Special Committee on Decolonization', (25 February 2010, GA/COL/3199) <http://www.un.org/press/en/2010/gacol3199.doc.htm> accessed 1 November 2017 [bold emphasis added]

**Key words:** Colonialism, Decolonization, United Nations, Committee of 24, Deleuze, Gibraltar, Non-Self-Governing Territory

It is high time that the Committee of 24 recognises *sui generis* forms of decolonization. That the last decade has seen zero territories graduate from the UN's list of Non-Self-Governing Territories ('NSGT') has been attributed to the political, institutional but also conceptual shortcomings of the Committee.<sup>2</sup> This article deploys Deleuze's philosophy of recognition to provide an account of the Committee's inadequate understanding of decolonization and the current stasis the seventeen listed territories on its list find themselves in.

Ban Ki-Moon's 2010 statement was delivered at the end of the UN's Second International Decade for the Eradication of Colonialism and the 15<sup>th</sup> anniversary of the UN General Assembly Resolution 1514(XV),<sup>3</sup> *the Declaration on the Granting of Independence to Colonial Countries and Peoples*, whose progeny, the Committee of 24, is tasked with its implementation. Several years on, and the Committee is now in the Third International Decade for the Eradication of Colonialism (2011-20) with seventeen territories still on the UN's list of Non-Self-Governing Territories who remain targets of decolonization efforts. Paradoxically, many of those territories have high levels of internal self-government, with some having exercised plebiscites to maintain particular constitutional arrangements under the sovereignty of independent states. Demands for delisting based on these realities have typically received neither the assent nor recognition of the Committee of 24.

Significantly however, the former UN Secretary General's address to the Committee of 24 spoke of greater overtures that, whether intended or not, ostensibly problematized the three fixed

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<sup>2</sup> Oliver Turner, 'Finishing the Job: the UN Special Committee on Decolonization and the politics of self-governance' (2013) 34, 7 *Third World Quarterly* 1193-1208; Peter Gold, 'Gibraltar at the United Nations: Caught between a treaty, the charter and the 'fundamentalism' of the special committee' (2009) 20, 4 *Democracy and Statecraft* 697-715

<sup>3</sup> The legality of the resolution, as with all General Assembly Resolutions, is contingent on wording of the text, the voting record, statements made during the adoption of the resolution and *post factum* state practice. Helen Quane, 'The United Nations and the Evolving Right to Self-Determination' (1998) 47 *International and Comparative Law Quarterly* 551

categories of decolonization- integration or free association with an independent state or independence- as static and rigid. A deconstruction of the former Secretary General's statement appears to challenge the anticipatory nature of the fixed categories of decolonisation. These *modus operandi* intend to forestall all the possible manifestations of decolonization but those which it does not recognise under either of its three categories, do not satisfy the requisites of decolonization. Alternatively, the statement above posits the primacy of 'specific circumstances' that warrant 'a pragmatic and realistic approach' rather than the subsumption of 'specific circumstances' by the three fixed categories of decolonization. This is the *sui generi* approach to recognition of decolonization. It is through the primacy of the circumstances, rather than their subsumption by the fixed categories of decolonization, that new *sui generis* forms of decolonization may emerge which is 'likely to lead to concrete results.'

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The limits of the Committee of 24's work have been variously discussed and provide important contributions as to the *institutional* and *political* limitations frustrating attainment of its objectives. These pertain to i) its narrow understandings of colonialism, ii) its similarly narrow understandings of decolonisation and iii) the institutional and political constraints on the Committee.<sup>4</sup> On this latter point, it has been claimed that the Committee is beleaguered by the 'North-South Theatre' in which 'point-scoring' play out between the primarily Global South dominated Committee of 24 against the primarily Global North Administering Powers of the seventeen listed territories.<sup>5</sup> While it is acknowledged that there has been some fracturing of the dichotomy, it is also the case that the division between the global north and south remains a reality in many facets of global law and politics.<sup>6</sup>

Comment [A1]: Define both global north and south here.

<sup>4</sup> Oliver Turner, 'Finishing the Job: the UN Special Committee on Decolonization and the politics of self-governance' (2013) 34,7 Third World Quarterly 1193-1208; Peter Gold, 'Gibraltar at the United Nations: Caught between a treaty, the charter and the 'fundamentalism' of the special committee' (2009) 20, 4 Democracy and Statecraft 697-715

<sup>5</sup> Oliver Turner, 'Finishing the Job: the UN Special Committee on Decolonization and the politics of self-governance' (2013) 34,7 Third World Quarterly 1193-1208

<sup>6</sup> Hakeem O. Yusuf, "High Value" Migration and complicity for underdevelopment and corruption in the global south – Receiving from the attic' (2012) 33, 3 Third World Quarterly 441-457, 441-442.

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This paper seeks to examine the philosophical underpinnings of the Committee's limitations in its understandings of what constitutes decolonization. It begins by outlining the history and mission of the Committee of 24 before identifying some of its principal shortcomings. The paper then problematizes the limits of the narrow understanding- or fixed categories- of decolonization utilised by the Committee of 24 through a philosophical interrogation. It does this by applying Deleuze's critique of the 'philosophy of recognition' as the basis on which the Committee of 24 operates and then identifies the demerits of that basis. The paper then uses Gibraltar to illustrate how engaging Deleuze's *Encounter* would privilege the territory's form of self-government and plebiscites in the normative assessment and subsequent establishment of new categories of decolonization, by challenging the Committee's dogmatic philosophy of recognition. The case study recognises that though certain constitutional reforms need to be made- hence *toward a sui generis* status- Gibraltar is apt for establishing a more amenable, open-ended category of decolonization in the future which facilitates the aim of the Committee of 24 in 'finishing the job'<sup>7</sup> of decolonization.

## **1. The History and Mission of the Committee of 24**

The end of the Second World War was transformative for both Europe and the World. It appeared to mark the beginning of international co-operation after centuries of warring empires and presaged a new humanism, crafted under the auspices of the United Nations Charter which centred international peace, security, fundamental human rights and dignity as part of its project.<sup>8</sup> It was also a period of rapid decolonization from the great Imperial powers of Europe. However, certain territories remained in the throes of colonial governance. Chapter XI, Article 73 of the 1945 UN Charter<sup>9</sup> contained the 'Declaration Regarding Non-Self-Governing Territories' which placed obligations on the administering powers of those territories 'to promote to the utmost...the well-being of the inhabitants of these territories' as well as 'to

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<sup>7</sup> 'The United Nations and Decolonization'

<<http://www.un.org/en/decolonization/specialcommittee.shtml>> accessed 02 November 2017

<sup>8</sup> Charter of the United Nations, Preamble (adopted signed on 26 June 1945, entered into force 24 October 1945)

<sup>9</sup> Charter of the United Nations (adopted signed on 26 June 1945, entered into force 24 October 1945)

develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.'

From around the 1960's, the number of territories that had become decolonized (and therefore de-listed), began to drop for the first time.<sup>10</sup> The 14<sup>th</sup> and 15<sup>th</sup> of December 1960 however, were to prove particularly important dates in the history of decolonization. On the 14<sup>th</sup>, the General Assembly adopted Resolution 1514(XV) entitled *the Declaration on the Granting of Independence to Colonial Countries and Peoples*<sup>11</sup> which recognised the previously vague principle of self-determination,<sup>12</sup> that 'the peoples of the world ardently desire the end of colonialism in all its manifestations' demanding 'immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations.' A day later, Resolution 1541(XV) entitled *the Principles which should guide members in determining whether or not an obligation exists to transfer the information called for under Article 73e of the Charter*<sup>13</sup> was passed by the General Assembly. A major impetus for these developments was the fact that a number of former colonial territories had by then joined the United Nations. The interest of these new member states in decolonization made a

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<sup>10</sup> Turner, *supra* note 5, at 1198

<sup>11</sup> UNGA Res 1514 (1960) U.N. GAOR, 15th Sess., Supp. No. 16

<sup>12</sup> Self-determination is also recognised in Articles 1 and 55 of the UN Charter, Article 1 of the International Covenant on Civil and Political Rights 1966, Article 1 of the International Covenant on Economic, Social and Cultural Rights 1966 and considered a part of customary international law by the *Namibia Advisory Opinion* I.C.J., Advisory Opinion, 1971, I.C.J. Rep 16; See also Helen Quane, 'The United Nations and the Evolving Right to Self-Determination' (1998) 47 International and Comparative Law Quarterly 537-572

<sup>13</sup> UNGA Res 1541 (1960) GAOR, 15th Sess., Supp. No. 16. This entails the requirement on the Administering power of the territory to issue annual reports to the Committee Secretariat

significant difference to the hitherto declared but lamely pursued commitment of the United Nations to the cause.<sup>14</sup>

Importantly, Resolution 1541(XV) set out three ways in which a NSGT is said to have reached full self-government ('decolonization') and achieve subsequent de-listing. These are independence, free association with an independent state, or integration with an independent state. In 1961, the UN set up the Committee of 24<sup>15</sup> through Resolution 1654(XVI),<sup>16</sup> to monitor the implementation of Resolution 1514(XV). It was further tasked to make recommendations as to its implementation, conduct annual reviews of NSGTs, hear statements from NSGTs representatives, dispatch visiting missions, organize seminars on the political, social and economic situation in the Territories, make annual recommendations concerning the dissemination of information to mobilize public opinion in support of the decolonization process, and observe the 'Week of Solidarity with the Peoples of Non-Self-Governing Territories'.<sup>17</sup>

The success of the Committee of 24 cannot be understated. In 1945, a third of the world's population were considered to be living under a colonial power. That has now been reduced to 0.02%.<sup>18</sup> However, the rate at which NSGTs have achieved decolonized status in the ways circumscribed by Resolution 1541(XV) have all but plateaued since the 1990s. The Democratic Republic of Timor-Leste is the most recent success of the Committee, having gained independence from Indonesia back in 2002. In 2010, the Fourth Committee, a separate though related body focussing on specific cases of decolonization, peacekeeping, and a reviewing special political missions, had described the decolonization process as having arrived at a

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<sup>14</sup> Bardo Fassbender 'The Better Peoples of the United Nations? Europe's Practice and the United Nations' (2004) 15, 5 European Journal of International Law 857, 868-869.

<sup>15</sup> Its full name is the 'Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples'. The '24' refers to the number of members it had at one point though this was originally 17 and now stands at 29.

<sup>16</sup> UN GA Res 1654 (1961) GOAR, 16 Sess., Supp. No. 17

<sup>17</sup> 'The United Nations and Decolonization'

<<http://www.un.org/en/decolonization/specialcommittee.shtml>> accessed 02 November 2017

<sup>18</sup> Turner, *supra* note 5, at 1197

‘virtual halt’.<sup>19</sup> It argued that it was necessary to evolve ‘a new dynamic’ between collecting objective information about the situations in the remaining NSGTs, and to pursue a stronger dialogue between them and their administering powers. In the Committee’s most recent annual report, submitted to the General Assembly, it stated that it would similarly ‘emphasize the value of holding, during the intersessional period, informal consultations with the administering Powers and other stakeholders regarding the status of the Non-Self-Governing Territories on the Committee’s agenda.’<sup>20</sup>

## ***2. The Committee of 24’s Principal Shortcomings***

The inability of the Committee of 24 to finish the job of eradicating colonialism has been attributed primarily to its political and institutional failures. Oliver Turner frames the tension between the primarily ‘Global-South’<sup>21</sup> countries of the Committee of 24 and the primarily ‘Global-North’<sup>22</sup> countries of the administering powers as actors in the ‘North-South Theatre’.<sup>23</sup> Rather than acting in furtherance of eradicating colonialism, Turner claims that the Committee has been used as a proxy forum for point-scoring. States belonging to the Non-Aligned Movement or other Southern or so-called ‘third-world’ groupings, have been more interested in one-up-man-ship over states belonging to variations of Euro-American alliances, rather than creating productive groupings in pursuit of the Committee’s aims.<sup>24</sup>

Turner is quick to acknowledge however, the indeterminacy of the Global –North/-South<sup>25</sup> nomenclature, particularly with reference to where certain countries, such as Russia and China,

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<sup>19</sup> UN General Assembly, ‘Decolonization Process at ‘Virtual Halt’’, (8 October 2012) <<https://www.un.org/press/en/2012/gaspd504.doc.htm>> accessed 02 November 2017

<sup>20</sup> UN Special Committee on Decolonization (71<sup>st</sup> Session) ‘Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples for 2016’ (14 July 2016) UN DOC A/71/23, 21

<sup>21</sup> Including Syria, Iran, India and Cuba

<sup>22</sup> The UK, US, France and New Zealand

<sup>23</sup> T Weiss, ‘ECOSOC and the MDGs: what can be done?’ in R Wilkinson & D Hume (eds), *The Millennium Development Goals and Beyond* (Routledge 2012) 119

<sup>24</sup> Turner, *supra* note 5, at 1201

<sup>25</sup> Other ‘divisions’ have been attributed to theological diversions, dividing physical geographical regions, such as the *Great Schism of 1054*. However, postcolonial scholars have said that such divisions are artificial constructs, created by discourses of power with their originals in colonialism. See Edward Said, *Orientalism* (Penguin Books 1978) 52, 54-7, 155-57



would be situated.<sup>26</sup> The script of the North-South Theatre therefore means that the Committee is often ignorant to cases of colonialism among countries of the Global South<sup>27</sup> or overly sensitive to what it sees as aberrations in the territories under the administration of Global North countries, such as Gibraltar and Bermuda- despite both boasting 'relatively stable and effective local administrations and comparatively high levels of GDP per capita'.<sup>28</sup> Turner isn't attempting to mitigate the responsibility of the primarily European perpetrators of Imperial and Colonial endeavours, but to illustrate the subversion of the Committee's goals under the politics of self-interest of its members.

Interestingly however, Turner also identifies the theoretical inadequacies of the Committee of 24, both in its conceptualisations of colonialism and decolonization which inform its work. He explains how the Committee's understanding of colonialism is 'fundamentally limited and broadly unsuited to the 21<sup>st</sup> century' as 'forms of colonial domination are widespread, myriad and complex and often persist in alternative guises long after official independence'.<sup>29</sup> Drawing from International Relations and Critical Geography literature, he describes how colonialism can be defined beyond the typical notions of transplantations of settler populations into different territories. Colonial power is more than mere physical occupation or 'conquer and rule'<sup>30</sup> but 'operates as an impersonal force through a multiplicity of sites and channels, through which the impersonal forces may still linger in the absence of a discernible colonizer'.<sup>31</sup> What could be described as the 'reformulations of colonial power' or colonialism as 'trans-historical'<sup>32</sup> have also been engaged by lawyers. Nathaniel Berman illustrates how the imperial imagination has the ability to reinvent itself under changing conditions<sup>33</sup> and how the failure to notice structural continuities may hasten us to overestimate the extent to which modern international

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<sup>26</sup> Turner, *supra* note 5, at 1202

<sup>27</sup> *Ibid.*, at 1203

<sup>28</sup> *Ibid.*, at 1203

<sup>29</sup> *Ibid.*, at 1194

<sup>30</sup> *Ibid.*, at 1199

<sup>31</sup> Law Wing Sang, *Collaborative Colonial Power: The Making of Hong Kong Chinese*, Hong Kong, (Hong Kong University Press 2009) 3

<sup>32</sup> A Ahmed, 'The politics of literary postcoloniality' (1995) 36, 3 Race and Class 9

<sup>33</sup> Nathaniel Berman, 'In the Wake of Empire' (1999) 14 American University International Law Review 1531

law has broken away from its imperial past.<sup>34</sup> For example, some scholars contend that the UN Charter's exceptions to the general proscription of the use of force against the political or territorial integrity of a state, or the contemporary international trusteeship system are covers for colonial endeavours which have been 'reimagined'.<sup>35</sup>

Particularly relevant here is what Turner recognises as the conceptual limitation in the Committee of 24's understandings of decolonization, by virtue of which it accepts 'only one of three predetermined outcomes' as satisfying its criteria delisting. This approach, Turner points out, is the product of the North-South ensemble which has meant the Committee of 24 thereby has

established a singular ideology as authoritative fact before granting an opportunity for debate...the Committee therefore imposes upon people of a certain legitimate persuasion the task of proving themselves worthy of their opinion because the forum they enter- rather than that of an 'honest broker'- is fundamentally biased against them. Just as colonial powers have traditionally spoken for the people they control, so the Special Committee renders the inhabitants of NSGTs voiceless to the extent that it dictates what their futures should entail.<sup>36</sup>

This paper picks up from Turner's theoretical observations as to the insufficiencies of the three categories of decolonisation. The conventional *modus operandi* of free association, integration or independence, affirmed in Resolution 1541(XV) stymie the Committee's attainment of its objectives because of its philosophical underpinnings. The philosophical underpinnings of the Committee are characterised, it is now argued, by a dogmatic philosophy of recognition which produces conceptual cul-de-sacs that prevent further decolonisation.

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<sup>34</sup> Ibid., at 1542

<sup>35</sup> Ibid., at 1521- 1561; See also Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (CUP 2009) 18-37; Gustavo Gozzi, 'The "Discourse" of International Law and Humanitarian Intervention' (2017) 30, 2 Ratio Juris 186-204

<sup>36</sup> Turner, *supra* note 5, at 1204

### 3. Deleuze, the Philosophy of Recognition and ~~The~~ Encounter

This section argues that the operation of the Committee of 24 and its 3 *modus operandi* of decolonization is predicated on a ~~dogmatic~~ philosophy of recognition. Recall that the main issue here with the Committee's approach to its work is its choice of parameters for recognising a territory as being decolonized. If philosophy is about resisting and disposing of *doxa*, then a philosophy of recognition, according to Deleuze, is wholly inadequate. A philosophy of recognition is 'an approach that seeks only to *recognize*...because it *a priori* assigns a representational form to the outside; it presumes that the encountered thing is only another identifiable instance of an existing concept'.<sup>37</sup> ~~A philosophy of recognition~~ It 'has based its supposed principle upon extrapolation from certain facts, particularly insignificant facts such as Recognition, everyday banality in person'.<sup>38</sup> Implicit in such an approach, is the suppression of concrete reality.<sup>39</sup> ~~Philosophy therefore, has never really busied itself with truth but instead with establishing the conditions for a 'truth' which have been formulated on a principle of recognition.~~

If philosophy is about resisting and disposing of *doxa*, then a philosophy of recognition, according to Deleuze, is wholly inadequate. The Committee of 24's approach to decolonization can be said to be predicated on a dogmatic philosophy of recognition. Its current criteria can be considered a 'top-down' or subsumptive approach to decolonization - in that 'specific circumstances' are ignored to fit NSGTs, if possible, into the 3 fixed categories through recognition. This may have been appropriate seventy years ago but has become ill-suited to the multifarious and evolving experiences and understandings of self-determination. A problem thus arises from the adoption of the philosophy of recognition by the Committee of 24 because of its dogmatism.

<sup>37</sup> Alexandre Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza* (Stanford University Press, 2008) 60

<sup>38</sup> Gilles Deleuze, *Difference and Repetition* (Paul Patton tr, Columbia University Press 1968) 135

<sup>39</sup> This is later discussed in 'the Encounter'

It is no coincidence that Turner describes the process of delisting of NSGTs as only being granted through 'one of three predetermined outcomes' or the Committee of 24's paramount problem as 'dictating what their [NSGT] futures should entail.' These are all characteristics of the anticipatory nature of the philosophy of recognition that imbues the Committee's decolonization approach. In other words, the concepts or more accurately here, categories of decolonization from Resolution 1541(XV) attempt to anticipate all different instantiations of decolonization. There may be variations within each of the three categories, but those differences are still contained within the broader genus of the foundational categories- independence, free association or integration. An example of self-government among the NSGTs therefore, which doesn't fit into these broad categories or their finer gradations- as an 'identifiable instance' of the broader categories- simply does not get 'recognised' as a decolonized territory. This dogmatic philosophy of recognition, which prefigures the categories of decolonization, are problematic because many of the territories on the UN List of NSGTs have particularly high-levels of government- some akin to independent states- and some have often exercised plebiscites to maintain their current constitutional arrangements.

Deleuze's claim is that the dogmatic image of thought as a presupposition has plagued philosophy since antiquity.<sup>40</sup> ~~with~~ Deleuzians stating that 'a consistent long-standing set of unexamined opinions has haunted and compromised thought since its beginning'.<sup>41</sup> Anything thought about outside the general concept is not recognised, or its unique differences are extinguished. Philosophy as recognition therefore is 'concept/category centric'. It states that conventional epistemologies are typically based on pre-ordained categories which only cognize phenomena (or 'the thing thought about') as instances of those pre-ordained categories. In effect, the thing exists only for the purposes of the concept. Thinking in this way takes place on the basis of 'that which is being thought about' and its appropriateness within the broader category or concept. This is precisely the nature of the approach of the Committee of 24 to its

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<sup>40</sup> Deleuze, *supra* 37, at 132

<sup>41</sup> Lefebvre, *supra* note 36, 60; See also Gilles Deleuze, *Difference and Repetition* (Paul Patton tr, Columbia University Press 1968) 147

recognised categories of decolonization. Its approach works to exclude specific circumstances of territories that have asserted self-determination (even with the concurrence of their former colonisers) but are not validated or affirmed as such by the Committee of 24 for not falling into its recognised categories.

~~To illustrate the pervasiveness of this approach to thought, Deleuzians explore Aristotle's famous categories and how they in fact articulate an ontology based on a method of division that is resistant to unrecognisable phenomena. For example,<sup>42</sup> imagine one is confronted with a creature that they are initially unfamiliar with. In the determination of what that creature is, one may begin with a broad genus of distinction (e.g. "animal", "plant" or "human"). Once that has been established, one may proceed to more 'finer grained' subgenera to determine the creature (e.g. "with feet," "without feet") and continue to descend to finer categories of distinction (e.g., "cloven-footed," "noncloven footed") until eventually, a determination is arrived at – or *teleutaia* – of what the creature is. This is what captures the 'essence' of the thing being thought about. However, the categories in Aristotle's ontology reconciles 'finer criteria' within the same broader genus. There is only difference *within* the broader category rather than a new category being established to capture the essence of the thing being thought about. So while there appears to be difference among the 'cloven-footed' and 'non-cloven-footed' creature, they are still contained within a broader concept of 'creatures with feet'.~~

~~As Deleuze stated 'contrariety alone expressed the capacity of a subject to bear opposites while remaining substantially the same (in matter or in genus)'.<sup>43</sup> Thus difference is only based on an opposite, in which both are etymologically linked under the umbrella of a more abstract category or concept, preserving the concept's fixed identity. Where Aristotle may have thought he provided an ontology based on categories and difference, Deleuze reads this as 'the~~

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<sup>42</sup> Lefebvre, *supra* note 36, 63

<sup>43</sup> Deleuze, *supra* 37, at 30

inscription of difference within the identity of the concept'.<sup>44</sup> Anything thought about *outside* the general concept is not recognised, or its unique differences are extinguished.

What Deleuze in effect describes in his critique of Aristotle's categories is effectively a *subsumption* of difference of the 'thing being thought about' to the overarching concept. Thinking in this way takes place on the basis of 'that which is being thought about' and its appropriateness within the broader category or concept. Though these concepts may become more 'finer-grained' as we descend the taxonomic hierarchy (from animal, to feet/non-feet, to cloven/non-cloven feet), differences which are not recognised by the finer gradations of the conceptual categories are either ignored (i.e. not recognised) or subsumed (with their non-recognisable differences extinguished). Difference therefore only occurs in relation to difference *between* things and their appropriateness to the broader categories, rather than difference *in* the thing itself. Anything which is not recognised within the broader or finer categories of the taxonomy, does not satisfy such classification.

Deleuze claims that modern philosophy is similarly marred by the banality of 'recognition' in which unique differences- those not contained within a broader category or concept- are elided.

On this account, 'the elementary concepts of representation are the categories defined as the conditions of possible experience. These, however, are too general, too large for the real'.<sup>45</sup> In the Committee of 24's current approach to decolonization, it has, on the Deleuzian frame of analysis, reified its recognised categories as the only possible circumstances for self-determination in international law, a problematic position, as Ban Ki Moon's statement above emphasised.

In contemporary philosophy, scientific laws see phenomena as particular expressions of general laws. Deleuzian says of Kant, understood as a product of the emergent 18<sup>th</sup>-century scientific

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<sup>44</sup> Lefebvre, *supra* note 36, at 64

<sup>45</sup> Deleuze, *supra* 37, at 68-9

method, that 'at the expense of singular actions, practices, and dispositions, moral law grounds us in the arrangement between the general and the particular actions are converted- tested- into repeatable particularities of a general more law.'<sup>46</sup> Kant's transcendental judgment for example, is just the apprehension of an object which requires an abstraction from all content<sup>47</sup>- or difference. Inhered in the transcendental faculties is an anticipatory element which 'delimits the frame for every possible experience and event *before* it occurs'.<sup>48</sup> Deleuze states that 'the elementary concepts of representation are the categories defined as the conditions of possible experience. These, however, are too general, too large for the real'.<sup>49</sup>

~~Philosophy as recognition therefore is 'concept/category centric'. It states that conventional epistemologies are typically based on pre-ordained categories which only cognize phenomena (or 'the thing thought about') as instances of those pre-ordained categories. In effect, the thing exists only for the purposes of the concept. Truth, so understood, is merely recognition, an 'identifiable instance of an existing concept'.~~

The Deleuzian construction of *The Encounter* unsettles the ~~is~~ dogmatic process of recognition of the sort the Committee of 24 has adopted in its work so far. ~~It~~ *The Encounter* is an anathema to the dogmatic philosophy of recognition- a metaphysical violence.<sup>50</sup> It is not about making concepts or categories quantitatively (more numerous) or qualitatively (more flexible) different, ~~for that would still fall into the dogma of recognition<sup>51</sup> which are subsumed under fixed (though finer) categories or concepts.~~ The Encounter rather, is about the *primacy* of that which is thought about- or to borrow from Ban-Ki Moon's statement, 'specific circumstances' of a territory such as Gibraltar. Encounters exist *outside of thought* in that they are unrecognizable by the concepts or categories. Real thought, according to Deleuze, lies in the primacy of the Encounter. By 'primacy' therefore, we understand this to be the rejection of recognition,

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<sup>46</sup> Ibid., at 67-68

<sup>47</sup> Ibid., at 69-72

<sup>48</sup> Ibid. at 71

<sup>49</sup> Deleuze, *supra* 37, at 68-9

<sup>50</sup> Lefebvre, *supra* note 36, at 73

<sup>51</sup> Deleuze, *supra* 37, at 303

resisting the privileging of the concept or category, and the elevation of the thing being thought about- the 'specific circumstances'. The thing thought about ceases to be an 'identifiable instance' contained within a concept or category, or an instantiation of a universal law of the transcendental conscious, but is unique in and of itself. Whereas 'concepts only ever designate possibilities', Deleuze describes the Encounter as 'that which forces thought to raise up and educate the absolute necessity of an act of thought or a passion to think.'<sup>52</sup> This is precisely the challenge the Committee of 24 needs to embrace to progress its work with the experience of changing global political dynamics.

~~The Committee of 24 to decolonization can be said to be predicated on a dogmatic philosophy of recognition. Its current criteria can be considered a 'top-down' or subsumptive approach to decolonization – in that 'specific circumstances' are ignored to fit NSGTs, if possible, into the 3 fixed categories through recognition. This may have been appropriate seventy years ago but has become ill suited to the multifarious and evolving experiences and understandings of self-determination.~~

~~It is no coincidence that Turner describes the process of delisting of NSGTs as only being granted through 'one of three predetermined outcomes' or the Committee of 24's paramount problem as 'dictating what their [NSGT] futures should entail.' These are all characteristics of the anticipatory nature of the philosophy of recognition that imbues the Committee's decolonization approach. In other words, the concepts, or more accurately here, categories of decolonization from Resolution 1541(XV) attempt to anticipate all different instantiations of decolonization. There may be variations within each of the three categories, but those differences are still contained within the broader genus of the foundational categories- independence, free association or integration. An example of self-government among the NSGTs~~

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<sup>52</sup> Ibid., at 139



~~therefore, which doesn't fit into these broad categories or their finer gradations as an 'identifiable instance' of the broader categories simply does not get 'recognised' as a decolonized territory. This dogmatic philosophy of recognition, which prefigures the categories of decolonization, are problematic because many of the territories on the UN List of NSGTs have particularly high levels of government some akin to independent states and some have often exercised plebiscites to maintain their current constitutional arrangements.~~

~~A change in the epistemic approach of the Committee of 24, one which harnesses the primacy of the Encounter and dispenses with the dogmatic philosophy of recognitions inertia, would be able to establish *sui generis* categories of decolonization beyond the three recognised *modus operandi*. It would do this by identifying examples of decolonization not as identifiable instances of the 3 fixed categories, but through elevating the 'specific circumstances' to use Ban Ki-Moon's statement of each NSGT. Indeed, it is no coincidence that this form of thinking for Deleuzians<sup>53</sup> is referred to as creative, and that Ban-Ki Moon similarly pleads for 'creative solutions'. Further, the Committee would do well to honour its 2016 annual report abovementioned, to facilitate 'consultations with the administering Powers and other stakeholders regarding the status of the Non Self Governing Territories on the Committee's agenda'. Through this dialogue, those 'special circumstances' may emerge that are able to challenge the inelasticity of the categories.~~ Of the territories on the UN's list which is particularly apt for committing this 'metaphysical violence' in establishing a *sui generis* decolonised status, is the territory of Gibraltar.

#### **4. Gibraltar and the 'Fourth Option'**

The problem confronting the Committee of 24 is in its limited conceptualisation of decolonization. These are satisfied only by instantiations of the three fixed categories in Resolution 1541(XV) which have been explained as predicated on a dogmatic philosophy of recognition. Anything which is not *recognised*, fails to be considered as decolonized and

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<sup>53</sup> Lefebvre, *supra* note 36

subsequently delisted. This is problematic given that many territories on the UN's list ought to be considered decolonized for the fact that they have levels of self-government akin to independent states or they have exercised plebiscites to maintain particular constitutional arrangements with an independent state. So long as the philosophy of recognition informs the Committee of 24's decolonization strategy, the seventeen territories are likely to remain on the UN's list. To be clear however, this paper is not articulating a conceptualisation of decolonization so broad that it captures territories that are clearly under colonial power but recognises that the concepts of decolonization are in need of revision through the establishment of a category which is open and sensitive to the particularities of the NSGTs.

### ***A. Broadening Self-Determination: The 'Fourth Option' of decolonization***

A partial confusion exists in the decolonial vocabulary of International Law. This stems from the fact that terms such as 'decolonization', 'self-determination', 'independence', 'self-government' and so on, were either not initially defined, defined in reference to one another or defined tautologically.<sup>54</sup> Self-Determination however, is the preeminent term in understanding the process toward decolonization. It was first mentioned in the UN Charter, Article 1(2), which proclaims the 'respect for the principle of equal rights and self-determination of peoples' and is mentioned again in Article 55 where it promotes international economic and social co-operation on the basis of 'equal rights and self-determination of peoples'. Further, it is also recognised in common Article 1 of the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966. Importantly, Resolution 1514(XV) focussed self-determination as part of the international law applicable to colonized territories (NSGT). Thus, it can be understood that decolonization is effected through self-determination. Indeed, in the *Namibia Advisory Opinion*,<sup>55</sup> the International Court of Justice held that self-determination applied to all peoples in colonial territories and this was recognised

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<sup>54</sup> Turner, *supra* note 5, at 1199

<sup>55</sup> I.C.J., *Advisory Opinion*, 1971, I.C.J. Rep 16

as part of customary international law in the *Western Sahara Case*.<sup>56</sup> Consistent state practice from colonial powers<sup>57</sup> and the absence of denial or contrary practice have confirmed, to some commentators<sup>58</sup>, that self-determination is *jus cogens*.

The key scholastic discussions around self-determination have tended to focus on its scope (particularly as to whether it extends beyond non-colonial situations);<sup>59</sup> what constitutes 'peoples';<sup>60</sup> the internal versus external dimensions of self-determination<sup>61</sup> and whether it is a moral or legal principle- though this question has largely been settled by the *Namibia Opinion* and *Western Sahara Case*.<sup>62</sup> Another key point of contention pertains to the limits on self-determination particularly that of 'territorial integrity' and competing claims over a territory.<sup>63</sup>

Though self-determination and decolonization may be considered as coterminous, self-determination can more accurately be described as the umbrella term that captures the different *modus operandi* of decolonization. Resolution 1541(XV) therefore, recognised the different *modus operandi* of decolonization which are each examples of self-determination- free association, integration and independence. However, a broadening of the principle of self-determination, through the addition of another *modus operandi* of decolonization, was to occur in October 1970.

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<sup>56</sup> [1975] ICJ Rep 12

<sup>57</sup> Statement by the UK's representative in the Security Council on 25 May 1982 (1983) 54 BYBIL 371-371

<sup>58</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Perspective* (CUP 1995) 140

<sup>59</sup> Helen Quane, 'The United Nations and the Evolving Right to Self-Determination' (1998) 47

International and Comparative Law Quarterly 558-571; Robert McCorquodale, 'Group Rights' in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds), *International Human Rights Law* (OUP 2014) 340-341

<sup>60</sup> Quane, *supra* note 57, at 541, 548-558; ; Robert McCorquodale, 'Group Rights' in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds), *International Human Rights Law* (OUP 2014) 337-338

<sup>61</sup> Robert McCorquodale, 'Group Rights' in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds), *International Human Rights Law* (OUP 2014) 341-343; this is dealt with later when discussing the status of Gibraltar.

<sup>62</sup> See also Malcolm Shaw, *International Law-6 edition* (CUP 2008) 251-257

<sup>63</sup> This conflict, between self-determination and territorial integrity, emerged in Resolution 1514(XV). This is dealt with later when discussing the status of Gibraltar. See also McCorquodale, *supra* note 59, at 346-348

The General Assembly adopted Resolution 2625(XXV)<sup>64</sup> entitled *the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*. The Resolution reaffirmed the three conventional categories for decolonization but importantly, added the possibility that ‘the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.’ This ‘fourth-option’<sup>65</sup> has opened up the possibilities of decolonization (so as to make the options available open-ended) [including provision for] a closer relationship with the metropolitan power,<sup>66</sup> presenting ‘more flexible options set out in Resolution 1541(XV)’.<sup>67</sup>

Resolution 2625(XXV) and the fourth option, it is argued, appeared to develop the principle of self-determination and prefigured a pragmatic approach to decolonization that Ban Ki-Moon would later articulate to the Fourth Committee. This pragmatism, which is facilitated by the Resolution, can be explained through Deleuze’s notion of the Encounter. Far from being another ‘fixed category’ predicated on a dogmatic philosophy of recognition, Resolution 2625(XXV) provides for the possibility of the primacy of the Encounter- or the opportunity for the ‘specific circumstances’ of the NSGTs to determine what constitutes decolonization. It expands the three fixed categories of decolonisation to enable a determination of decolonized status based on ‘other political status freely determined’. This suggests that the ‘special circumstances’ are privileged over and above the three fixed categories. The word ‘other’ is especially prescient. It suggests that the possibilities of what constitutes colonialism are non-exhaustive. The Resolution does not try to specifically define- or anticipate as the other categories do- what ‘other’ forms of decolonized statuses may look like. In other words, it elevates the ‘specific circumstances’ of the NSGT, providing it the opportunity to articulate what is meant by a decolonised status. In effect, the Resolution *recognises the unrecognised*.

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<sup>64</sup> UNGA Res 2625 (1970), U.N. GAOR, 25th Sess., Supp. No. 28

<sup>65</sup> Javier J. Rua Jovet, ‘The Fourth Option: Modern Self-Determination of Peoples and the Possibilities of U.S. Federalism’ (2010) 49 *Revista de Derecho Puertoriqueno* 218

<sup>66</sup> Rua Jovet, *supra* note 63, at 218

<sup>67</sup> Patrick Thornberry, ‘Minorities, Human Rights: A Review of International Instruments’ (1989) 38, 4 *The International and Comparative Law Quarterly* 875

## ***B. From Colonies to British Overseas Territories: ~~the UK~~Gibraltar and Other ~~and its~~ NSGTs***

Since antiquity, Gibraltar has passed through Moorish, Spanish and now British hands- though Spanish claims to the territory continue and remain relevant in the legal (particularly constitutional), political and economic arrangements and governance of the territory.<sup>68</sup> Despite Roman and Phoenician settlement in the surrounding Bay of Gibraltar, Muslim Moors from the Maghreb (North Africa, now principally Morocco, Algeria, Tunisia and Libya) were the first architects of the territory in 711CE. The area formerly known as Mons Calpe was thus renamed 'Mountain of Tarik' or Djebel Tarik in Arabic- the corrupted portmanteau of which forms the contemporary name of the territory- after the Muslims emerged victorious in what is known as the Battle of the Guadalete.<sup>69</sup> Apart from a brief interruption in Muslim rule by King Ferdinand IV in 1309, it was not until 1462 that the Christian Reconquista recaptured Gibraltar. A comparatively short period of 240 years of rule under the Spanish- the shortest period of sovereignty over Gibraltar among the Muslims, Spain and the British, came to an end when the territory was ceded to Britain in 1713 through the Treaty of Utrecht<sup>70</sup>, following the Spanish War of Succession.<sup>71</sup> Today, Gibraltar is one of fourteen British Overseas Territory (BOT) <sup>72</sup> ten of which are considered NSGTs by the Committee of 24. There are seventeen NSGTs on the Committee of 24's list.

<sup>68</sup> Keith Azopardi, *Sovereignty and the Stateless Nation: Gibraltar in the Modern Legal Context* (Bloomsbury Publishing 2009) 52-53; Joseph Garcia, *Gibraltar: The Making of People* (MedSun 1994) 71

<sup>69</sup> George Hills, *Rock of Contention: A History of Gibraltar* (Robert Hale Ltd. 1974) 59; William Jackson, *The Rock of the Gibraltarians: A History of Gibraltar* (Gibraltar Books 1987) 25-26

<sup>70</sup> George Hills, *Rock of Contention: A History of Gibraltar* (Robert Hale Ltd. 1974); William Jackson, *The Rock of the Gibraltarians: A History of Gibraltar* (Gibraltar Books 1987)

<sup>71</sup> George Hills, *Rock of Contention: A History of Gibraltar* (Robert Hale Ltd. 1974) 155-178; William Jackson, *The Rock of the Gibraltarians: A History of Gibraltar* (Gibraltar Books 1987) 89-115

<sup>72</sup> The other 4 of the UK's overseas territories are not listed as they do not have permanent populations

~~Of the seventeen territories considered NSGTs, the UK is the administering power for 10 of them, though they refer to them as British Overseas Territories ('BOTs').<sup>73</sup>~~ The BOTs are remnants of the former British Empire and their continued status as such is due to the inhabitants' wishes to remain under the sovereignty of the UK, the non-viability of independence, or because of the territories strategic value to the UK.<sup>74</sup> The territories vary in their size, location and population and are constitutionally distinct from one another, having separate constitutions with specificities contingent to the circumstances and challenges of each territory.<sup>75</sup> Common to all the BOTs is that they form part of the 'Crown's undivided realm' 'in the sense of government, power, ownership and belonging'.<sup>76</sup>

~~Common to all the BOTs is that they form part of the 'Crown's undivided realm' 'in the sense of government, power, ownership and belonging'.<sup>77</sup> To this effect, all the BOTs have a Governor or equivalent that 'is appointed by the Crown, represents the Crown, and is responsible to the Crown'.<sup>78</sup> Practically, this means that the BOTs do not have separate status from the UK for the purposes of international relations, the Judicial Committee of the Privy Council sits as the apex court for all territories, the UK Parliament retains unlimited power to legislate for them and any reforms to the constitutions of the BOTs require amendment by the UK either through an Order in Council or an Act of Parliament. Generally, the Governor will often have 'special responsibilities' which allow him/her to exercise exclusive executive and legislative power in certain areas, typically relating to defence, internal security, external matters, and appointments to public office. In addition, other powers, either exercised by the Secretary of State or HM,~~

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<sup>73</sup> ~~The other 4 of the UK's overseas territories are not listed as they do not have permanent populations~~

<sup>74</sup> For example, 2 BOTs are used exclusively as military bases (the British Indian Ocean Territory and the Sovereign Base Areas) though many BOTs, such as the Falklands and Gibraltar, have served dual civilian and military functions.

<sup>75</sup> Ian Hendry & Susan Dickson, *British Overseas Territories Law* (Hart 2011)

<sup>76</sup> *Tito v. Waddell (No 2)* [1977] Ch 106; This was also reaffirmed in *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Bancoult (No 2)* [2008] UKHL 61

<sup>77</sup> *Tito v. Waddell (No 2)* [1977] Ch 106; This was also reaffirmed in *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Bancoult (No 2)* [2008] UKHL 61

<sup>78</sup> E Wade & G Phillips, *Constitutional Law* (Longmans 1950) 403

~~through reserve, disallowance or general legislative powers are par for the course in colonial, Commonwealth and BOT constitutionalism.~~<sup>79</sup>

Self-determination however, appears to be at the heart of the UK's intended relationship with its overseas territories. A root and branch effort to modernise all the UK's BOTs began in 1997 under the Labour government. Despite their colonial origins, the contemporary constitutional relationships between the UK and the 14 BOTs have been described by UK White Papers as a 'partnership' and 'forward-looking',<sup>80</sup> predicated on reciprocal 'rights and responsibilities'.<sup>81</sup> The White Paper's stated aim was to initiate and continue a modernisation process informed by the following 4 principles; self-determination, responsibilities and reciprocity, the encouragement of self-government and providing support for the BOTs in times of emergency. The 2012 Conservative-Lib Dem White Paper, *The Overseas Territories: Security, Success and Sustainability*, sought to reenergise Labour's work on BOT modernisation. The coalition's vision was for the BOTs to be 'vibrant and flourishing communities', reemphasising the 4 principles from the previous white paper, with particular attention paid to self-determination. The white paper also set up an annual forum for UK Ministers and BOT governments, the *Joint Ministerial Council*, as well as separate offices in each government department to ensure cross co-ordination on policy rather than input being limited to the Foreign and Commonwealth Office. The Joint Ministerial Council's most recent 2016 Communique affirmed the importance of self-determination and stated that 'we agreed the need to continue our engagement on these issues to ensure that constitutional arrangements work effectively to promote the best interests of the Territories and of the UK' and that it 'will continue to support requests for the removal of the

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<sup>79</sup> ~~Hakeem Yusuf, *Colonial and Post Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (Routledge 2014); Hendry & Dickson, *supra* note 68~~

<sup>80</sup> Foreign and Commonwealth Office, *Partnership for Progress and Prosperity: Britain and the Overseas Territories* (White Paper, Cm 4264 1999) 6

<sup>81</sup> Foreign and Commonwealth Office, *The Overseas Territories: Security, Success and Sustainability* (White Paper, Cm 8374 2012) 8

Territory from the United Nations list of non-self-governing territories, expressing more utterances toward a relationship of collegiality between the UK and its BOTs.<sup>82</sup>

The *British Overseas Territories Act 2002* was an important piece of UK legislation that sought to reflect a shift in Whitehall parlance by renaming the former *Dependent Territories* as *Overseas Territories*- a nod to many of the BOTs' increasing self-government. However, notwithstanding this nomenclatural shift, it could be argued that the BOTs continue to be colonies pursuant to *Schedule 1 of the Interpretation Act 1978*:

“Colony” means any part of Her Majesty’s dominions outside the British Islands except...territories for whose external relations a country other than the United Kingdom is responsible...and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature are deemed for the purposes of this definition to be one colony.

This acute binary however, in the determination of whether a BOT constitutes a NSGT or not, is symptomatic of the philosophy of recognition that underlies the Committee of 24 and masks a far more complex picture.<sup>83</sup> This is because, though they may be legally defined as a colony for the purposes of UK law, many of the BOTs have very high levels of self-government akin to independent states. Further, some are able to commence, negotiate and conclude treaties and conduct external affairs largely on their own terms - an area typically the preserve of the imperial power in colonial constitutionalism.<sup>84</sup> Most importantly, many BOTs have chosen to remain under UK sovereignty through various referenda. To claim that there is a colonial relationship therefore, is overly reductionist. It is now argued that many BOTs which are NSGTs

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<sup>82</sup> UK Overseas Territories Joint Ministerial Council, ‘2016 Communique’ (Joint Ministerial Council, London, 01-02 November 2016)

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/565228/Overseas\\_Territories\\_Joint\\_Ministerial\\_Council\\_2016\\_Communique.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/565228/Overseas_Territories_Joint_Ministerial_Council_2016_Communique.pdf)> accessed 09 November 2017

<sup>83</sup> It is contended however, that if any of the BOTs were to establish a *sui generis* decolonized status following the necessary constitutional changes, an amendment would be required to the Interpretation Act 1978.

<sup>84</sup> Hendry & Dickson, *supra* note 68, at) 234-239, 257-261. These are known as entrustment agreements. Gibraltar has as entrustment regarding the exchange of tax information.



are on the precipice of establishing a *sui generis* decolonized status. One such example of a listed territory, and one which harnesses this complexity, is Gibraltar.

### ***C. Gibraltar at the UN***

It is particularly important to note the deliberate use of the term 'toward' in the title of this paper. This is to make clear that Gibraltar's preparedness, in establishing a *sui generis* decolonized category in exercising its right of self-determination, is nascent but not currently fully formed. Whilst it has been argued elsewhere<sup>85</sup> that Gibraltar is currently in a position to establish a *sui generis* category of decolonization, the establishment of such a category, this paper argues, is largely contingent on a series of reforms that would have to take place to precipitate de-listing. Still, Gibraltar situates itself well to establish this status because of the trajectory of its reform, the numerous referenda it has exercised in furtherance of its self-determination and the inadequacies of the three fixed categories of decolonization in recognising its unique circumstances.

As a British Overseas Territory, Gibraltar would appear to fall under the definition of a colony so-defined under UK Law. Indeed, the European Court of Justice, though recognising the separate constitutional status of Gibraltar, has referred to it as a British Crown Colony.<sup>86</sup> However, this only reveals part of a complex and multifaceted picture. The historical context of Gibraltar is imperative in explicating its singularity and why, therefore, it is appropriate for establishing a *sui generis* decolonized status.

From as early as 1946, Gibraltar has been considered a NSGT and its continued listing by the Committee of 24 continues to make it a target of decolonisation by the UN. This compels the UK, as the administering power, to submit annual reports to the UN Secretariat under Article 73(e) of the UN Charter. Meanwhile, subsequent to the Treaty of Utrecht, Spain has continued to make sovereignty claims over Gibraltar. Spanish sovereignty claims vary; from contending that

<sup>85</sup> Peter Gold, 'Gibraltar at the United Nations: Caught between a treaty, the charter and the 'fundamentalism' of the special committee' (2009) 20, 4 Democracy and Statecraft 697-715

<sup>86</sup> *Commission v. UK* (2003) C- 30/01; See also *Gibraltar Betting and Gaming Association Limited v Commissioners for Her Majesty's Revenue and Customs and Her Majesty's Treasury* C-591/15

the Treaty of Utrecht was signed under duress<sup>87</sup> to the claim that the Treaty was largely silent on the issue of sovereignty over certain parts of the territory. Perhaps most forcefully – and this is the position that has had most purchase at the UN and the Committee of 24 – is the claim that the alleged right (in the eye of the Spanish) of the Gibraltarians to self-determination constitutes an ‘attempt at the partial or total disruption of the national unity and the territorial integrity of a country’ which ‘is incompatible with the purposes and principles of the Charter of the United Nations.’<sup>88</sup> Put plainly, Spain claims the Gibraltarians do not constitute a ‘people’. The ‘territorial integrity’ argument has been largely accepted by the UN, who have repeatedly called for the decolonization of Gibraltar and a negotiated settlement between the British and Spain<sup>89</sup> while largely ignoring the wishes of the Gibraltarians.<sup>90</sup> Indeed, the most recent General Assembly Decision, taken on the recommendation of the Committee of 24, has continued to deny the Gibraltarian’s right to self-determination.<sup>91</sup>

The ‘trump’ of territorial integrity is a misnomer, however. Such a limitation is only justifiable if ‘external self-determination’ vis-à-vis independence is being sought after and in the absence of full ‘internal self-determination’, where a government represents the whole people of a territory without discrimination. Such a claim falls at the first hurdle as Gibraltar was acquired by the British through cession rather than conquest<sup>92</sup> and therefore both the question of whether or not there is internal self-determination vis-à-vis Spain is redundant- as is the desire for independence (which Gibraltar has never raised).

A more reasonable limitation on the Gibraltarian right to self-determination that the Spanish could have advanced is evidenced in the *East Timor Case*,<sup>93</sup> in which there were competing claims over the territory which was colonised by the Portuguese and occupied by Indonesia.

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<sup>87</sup> Alistair Ward, *España Britannia* (Shepherd-Walwyn 2004) 123

<sup>88</sup> UNGA Res 1514 (1960) U.N. GAOR, 15th Sess., Supp. No. 16, para 6

<sup>89</sup> Gold, *supra* note 77, at 697-715

<sup>90</sup> Countless UN resolutions refer to ‘interests’ rather than ‘wishes’ of the Gibraltarians as it is claimed that the latter would be admission of the Gibraltarians right to self-determination under International law. See below.

<sup>91</sup> UNGA Decision 69/523 (2015)

<sup>92</sup> Azopardi, *supra* note 79, at 20

<sup>93</sup> *East Timor (Portugal v. Australia)* [1995] ICJ Rep 6

The court however, recognised that the East Timorese had a right to self-determination. Further, the 'consultation of the people of a territory awaiting decolonization' was recognised by the International Court of Justice (ICJ) in the *Western Sahara Case*<sup>94</sup> and competing claims, even though they maybe lawful, would not undermine the exercise of the right of self-determination of the peoples. However, though some of the similarities may seem striking, Gibraltar has maintained time and time again its loyalty to Britain with no appetite for independence. Indeed whereas the contestation with East Timor seemed less clear cut, there can be no doubt that Gibraltar was ceded to the British in 1713.

All of the current fixed categories of decolonization have proved inappropriate for Gibraltar. For example, independence has never been an option for the territory. It has for so long considered itself as British and, even in times of British ambivalence, has always maintained a desire to sustain its constitutional links with the UK.<sup>95</sup> There is also a legal problem presented by the Treaty of Utrecht which appears to give Spain the right of first refusal should Britain ever wish to transfer sovereignty of the territory.<sup>96</sup> More pressingly, as a population of about 30,000 with its key markets in the EU and the UK, these links have been essential.<sup>97</sup> Integration, at one point a popular resolution to the question of Gibraltar, particularly with the ascendancy of the

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<sup>94</sup> [1975] ICJ Rep 12

<sup>95</sup> Joseph Garcia, *Gibraltar: The Making of People* (MedSun 1994) 24

<sup>96</sup> The preamble of the 2006 Constitution states that the UK will not transfer sovereignty of the territory against the freely expressed wishes of the Gibraltarians. See Gibraltar Constitution Order 2006 (adopted on 28 December 2006, entered into force 02 January 2007); Legal arguments have been advanced that the 'right of first refusal clause' in the Treaty of Utrecht, is voided by Gibraltar's right to self-determination of the Gibraltarians. This operates on the presumption that Gibraltar has a right to self-determination under international law and that self-determination is considered a principle *jus cogens*-which many have claimed, If these presumptions are accepted, according to Article 53 of the Vienna Convention on the Law of Treaties 1969, 'a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.' Other arguments have been advanced to the effect that the Treaty of Utrecht is no longer valid more generally because of the UN Charter. See also Azopardi, *supra* note 79, at 2013-28

<sup>97</sup> House of Lords EU Committee, *Brexit: Gibraltar* (2017, HL 116) 7-13

*Integration with Britain Party*, was refused by the British and put to bed in the Government's 1997 White Paper.<sup>98</sup>

Elected representatives of Gibraltar have contended for some time, that they are not governed through a colonial arrangement by the UK. As early as Resolution 1514(XV), then Chief Minister of Gibraltar, Joshua Hassan, made representations to the UN to this effect while arguing for its self-determination.<sup>99</sup> In the 1990s, the Chief Minister and Opposition leaders from Gibraltar made critical interventions to both the Committee of 24 and the Fourth Committee attempting to persuade them of Gibraltar's right to self-determination. Ministers from Gibraltar also levelled criticism at the rigidity of the UN's delisting criteria for NSGT under the three conventional *modus operandi* for decolonization.<sup>100</sup> During the Anglo-Spanish intergovernmental Brussels talks over the question of Gibraltar, the territory was largely sidelined. The then Chief Minister, Joe Bossano, boycotted the talks as they were predicated on sovereignty issues. However, Bossano continued to make representations to the UN of a 'fourth-option' for Gibraltar, ensuring maximum self-government with the UK retaining formal sovereignty.<sup>101</sup>

#### ***D. Contemporary Constitutionalism in Gibraltar: Toward a sui generis decolonised status***

High-levels of internal self-government which are 'freely determined'– to borrow from Resolution 2625(XXV)<sup>102</sup>– has formed the basis of Gibraltar's pursuit of the fourth option of decolonization. The framing of the resolution embraces the Deleuzian encounter given its potential for breaking down the dogmatic approach to decolonization currently stalling the work of the Committee of 24. Constitutional development in Gibraltar has been particularly

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<sup>98</sup> Foreign and Commonwealth Office, *Partnership*, *supra* note 72, at 13

<sup>99</sup> Garcia, *supra* note 91, at 133

<sup>100</sup> House of Commons Library Research Paper, *Gibraltar's Constitutional Future*, 02/37 of 22 May 2002, 52-53; House of Commons Library Research Paper, *Gibraltar: diplomatic and Constitutional Developments*, 06/48 of 11 October 2006, 18-21

<sup>101</sup> House of Commons Library Research Paper, *Gibraltar's Constitutional Future*, 02/37 of 22 May 2002, 15

<sup>102</sup> UNGA Res 2625 (1970), U.N. GAOR, 25th Sess., Supp. No. 28

buoyant from around the mid-1940s.<sup>103</sup> In 1999, the Gibraltar House of Assembly, set up a Select Committee on Constitutional Reform 'to review all aspects of its old constitution, the Gibraltar Constitution Order 1969, and to report back to the House with its view on any desirable reform thereof'.<sup>104</sup> The 'approach and objective' of the consultation sought to maximise self-government under the umbrella of British sovereignty as well as facilitate reforms that would result in the delisting of the territory from the UN List of NSGT. This was to be pursued through the 'fourth option' of self-determination.<sup>105</sup> The committee submitted a draft *Gibraltar Constitution Order 2001* as a series of amendments to the 1969 constitution which was then approved by the House of Assembly on 27 February 2002. Negotiations with the British Government took place between 2004 and 2006, concluding successfully in March of that year.

As part of the process, then UK Foreign Secretary, Jack Straw, informed the House of Commons that the approved constitution would be put to a referendum in Gibraltar.<sup>106</sup> However, opposition parties in Gibraltar were not satisfied by the UK Government's silence regarding the plebiscite on the nascent constitution being observed as an act of decolonisation. Further, there was significant diplomatic wrangling between the leader and opposition party in Gibraltar and the Foreign and Commonwealth Office over the preamble which, in the draft, omitted any reference to self-determination. This was particularly unusual, given that the Labour government had previously committed to this principle in its 1999 white paper. The Gibraltar Constitution Committee proposed an amendment to the Foreign Secretary in April 2006 to the effect that the referendum would be deemed an act of self-determination but this was rejected by the British government. However, despite its absence from the draft constitution, the then Secretary of State for Defence, Geoff Hoon, made clear that the referendum would be regarded

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<sup>103</sup> Garcia, *supra* note 91

<sup>104</sup> Select Committee on Constitutional Reform (HA 2002) 1

<sup>105</sup> *Ibid.*, at 2

<sup>106</sup> HC Deb 2007, c557

as an act of self-determination.<sup>107</sup> 60% of the Gibraltar electorate voted in favour of the new constitution ‘in exercise of [their] right to self-determination.’

Advances in Gibraltar’s constitution toward self-government, and thus decolonization vis-à-vis the fourth option are apparent and tangible. The Gibraltar Constitution Order 1969 had many of the hallmarks of a colonial constitution.<sup>108</sup> For example, the Governor, as the Monarch’s representative, formed part of the legislature<sup>109</sup> and elected ministers’ legislative competence had to lie within ‘defined domestic responsibilities’.<sup>110</sup> If the determination of what constituted a ‘defined domestic matter’ was contested, it was the Governor who would make the determination and an ouster clause meant that such decisions were precluded from review by the courts.<sup>111</sup> Further, bills which were unlikely to be passed within these defined domestic responsibilities could be enacted by the Governor in the interests of the ‘financial and economic stability’ of the territory.<sup>112</sup> The phraseology ‘financial and economic stability’, a nebulous term, was not constitutionally defined, effectively giving the Governor broad legislative powers. In addition, the Crown had a power to disallow bills,<sup>113</sup> again, as was typical of colonial constitutionalism.

Under the Gibraltar Constitution Order 2006, advances have been made to the effect of affording greater self-government for the territory. The Governor, as the representative of the UK monarch, is no longer constitutionally a part of the newly named legislature, ‘the Gibraltar Parliament’.<sup>114</sup> Further, unlike in previous constitutions in Gibraltar, the responsibility of the Governor is now circumscribed,<sup>115</sup> thus allotting the residual (and therefore broader) powers to the elected Ministers. Further, the British monarch no longer has the power to disallow

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<sup>107</sup> HC Dec 2006, c932

<sup>108</sup> This was despite the addition of a new preamble which stated that the territory would not pass into the sovereignty of another country without the wishes of the people

<sup>109</sup> Gibraltar Constitution Order 1969 (adopted on 23 May 1969, entered into force 30 May 1969) s. 24

<sup>110</sup> *Ibid.*, at s. 55

<sup>111</sup> *Ibid.*, at s. 55(2)

<sup>112</sup> *Ibid.*, at s. 34(2)

<sup>113</sup> *Ibid.*, at s. 37

<sup>114</sup> Gibraltar Constitution Order 2006 (adopted on 28 December 2006, entered into force 02 January 2007) s. 24

<sup>115</sup> *Ibid.*, at s.47(1)

legislation. The powers of disallowance and the non-circumscription of Governor's powers are emblematic of colonial constitutionalism and so their removal, set against the backdrop of self-determination, is significant. This was a victory for the yearning for self-government.

It is at this juncture that two key points need to be established. The first is to express a reservation that Gibraltar has yet reached the point at which it could be considered a decolonized territory under an open, *sui generis* fourth option. The second is that in spite of this however, Gibraltar is a clear contender to establish such a status in the prospect of further constitutional reforms. These both coalesce to underpin Gibraltar as gearing toward establishing a *sui generis* decolonized status. ~~These two points will now be developed.~~ Gibraltar is yet to reach a point at which it could be said to have attained such level of self-government that it ought to be considered a decolonized territory under a newly established fourth option. Indeed, this would necessitate further constitutional review and reform.<sup>116</sup> For example,<sup>117</sup> as a constitution that is a product of the UK's Royal Prerogative, its laws are considered 'colonial laws' for the purposes of the *Colonial Laws Validity Act 1856*<sup>118</sup> and thus it is susceptible to the 'doctrine of repugnancy'. The doctrine holds that colonial law which is contrary to provisions of a UK Act of Parliament extending to the 'colonies', or orders or regulations made under an Act, will result in the invalidation and inoperability of the colonial law.<sup>119</sup>

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<sup>116</sup> In 2016, the Gibraltar Parliament established a new Select Committee to review its constitution; Proceedings of the Gibraltar Parliament 2<sup>nd</sup> March 2016, 12-39

<sup>117</sup> This paper does not attempt to provide an exhaustive list of reforms that would likely precipitate de-listing

<sup>118</sup> Gibraltar Constitution Order 2006, *supra* 110, at ss. 2 & 3

<sup>119</sup> Hendry & Dickson, *supra* note 68, at 68; W. Ivor Jennings & C M Young, *Constitutional Laws of the British Empire* (Clarendon Press 1938) 33

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Another issue, and one recognised by the Committee of 24's Secretariats Annual Working Paper,<sup>124</sup> is the residual - or peace, order and good government power ('POGG') - of the UK Crown to legislate for the territory. POGG powers have been judicially interpreted to afford plenary legislative powers to the appointee<sup>125</sup> and were controversially deployed to expel citizens from the British Indian Ocean Territory.<sup>126</sup> Further, the Governor effectively has a power to withhold bills for the Crown's signification if they are deemed repugnant to 'good government'<sup>127</sup> - again a nebulous term - in addition to acting in accordance with Royal Instructions from HM in the exercise of his duties.<sup>128</sup>

Notwithstanding the foregoing, the Gibraltar situation remains apt for establishing a new paradigm of decolonization which does not fit into one of the three fixed categories. [Here, the Committee of 24 will benefit from adopting the Deleuze's elucidation of the encounter to break down its self-limiting philosophy of recognition.](#) This is for several reasons. First, despite the

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~~<sup>122</sup> Gibraltar Constitution Order 2006, *supra* 110, at ss. 2 & 3~~

~~<sup>123</sup> Hendry & Dickson, *supra* note 68, at 68; W. Ivor Jennings & C M Young, *Constitutional Laws of the British Empire* (Clarendon Press 1938) 33~~

~~<sup>124</sup> UNGA Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples 'Gibraltar: Working Paper prepared by the Secretariat' (7 March 2017) A/AC.109.2017/8, 4~~

~~<sup>125</sup> Hakeem Yusuf, *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (Routledge 2014)~~

~~<sup>126</sup> *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* (Bancoult No.2 (HL))~~

~~<sup>127</sup> Gibraltar Constitution Order 2006, *supra* 110, at s.33(2)(b)~~

~~<sup>128</sup> *Ibid.*, at s.20(3)~~



concurrence of constitutional advances and regressions in its 2006 constitution, Gibraltar still operates a high-level of self-government, second perhaps only to Bermuda among the BOTs. Further, the preamble to both the 1966<sup>129</sup> and 2006<sup>130</sup> constitutions assure that Gibraltar will not pass under the sovereignty of another territory without the democratically expressed wishes of its citizens. In addition, the territory has exercised plebiscites under the auspices of self-determination on several occasions. As a precursor to its 1969 Constitution, Gibraltar held a referendum as to whether it should remain British or pass into Spanish sovereignty. The result- with a 95.8% turnout- returned an overwhelming 99.1% vote to remain under British Sovereignty. In 2002, when Labour's then Foreign Secretary Jack Straw entertained the possibility of a joint sovereignty proposal between the UK and Spain, this was overwhelmingly rebuked in a 2002 referendum where 98.48% of Gibraltarians voted against it. Further, the 2006 Constitution was approved by 60% of the Gibraltar electorate 'in exercise of [their] right to self-determination.'

The weight of the various referenda on self-determination in Gibraltar cannot be ignored.

Ignoring them only reinforces the dogmatic philosophy of recognition that has not furthered the work of the Committee of 24 for several decades now and which puts its relevance, rtrahre ironically, into question. Though the UN condemned Gibraltar's 1967 plebiscite through UN Resolution 2353(XXII),<sup>131</sup> elsewhere it has accepted that they can be used to assess people's desire as to their future. This was evidenced in the former British Togoland<sup>132</sup> who voted whether they would remain a Trust Territory or become integrated into the Gold Coast upon the independence of Ghana. This example is particularly illuminating as it reveals the possibility of the UN to recognise plebiscites as an act of self-determination and, more broadly, the *primacy of the Encounter* as advanced by Deleuze. ~~Most importantly~~Relevantly too, -however, Gibraltar combines many features which are quintessentially not categorizable under the three fixed

<sup>129</sup> Gibraltar Constitution Order 1969, *supra* 105

<sup>130</sup> Gibraltar Constitution Order 2006, *supra* 110

<sup>131</sup> UNGA Res 2353 (XXII) G.A.O.R. Sess., 22. Supp., 16

<sup>132</sup> UNGA Res 994 (X) G.A.O.R. Sess., 10 Supp., 19, 24

categories. Indeed, one of the enduring themes of Gibraltar's contemporary constitutional reform has been its overarching desire to maintain its constitutional links to the UK. This makes the three fixed categories, stymied by a dogmatic philosophy of recognition, impermeable to Gibraltar's admission such that a *sui generis* open category is necessary.

~~In sum,~~ Deleuze's Encounter enables us to postulate a process in which the Committee could, through elevating the 'specific circumstances' of each territory, establish an open, *sui generis* category of decolonization which acknowledges these issues among the currently listed territories. Gibraltar, as one example, is primed for such establishment of a fourth option or category, being resistant to categorisation under the current three fixed categories, while it embarks on a trajectory toward greater self-government, combined with its history of plebiscites. The suggestion therefore is not that Gibraltar has reached an empirically ascertainable point- which would warrant a review of its constitutional arrangements, far beyond the scope of this paper- in which to establish this *sui generis* category, but that certain reforms of its constitution would enable it to do so in the future.

Overall, a revised understanding of decolonization in which primacy is given to the territories arrangements ought to presage further delisting and the eventual eradication of colonialism.

This approach aligns with Deleuze's epistemic offering for extricating the Committee of 24 from the current strait-jacket of dogmatic recognition of only certain categories of decolonization. A change in the epistemic approach of the Committee of 24, one which harnesses the primacy of the Encounter and dispenses with the dogmatic philosophy of recognition's inertia, would be able to establish *sui generis* categories of decolonization beyond the three recognised *modus operandi*. It would do this by identifying examples of decolonization not as identifiable instances of the 3 fixed categories, but through elevating the 'specific circumstances'- to use Ban Ki-Moon's statement- of each NSGT. Indeed, it is no coincidence that this form of thinking for Deleuzians<sup>133</sup> is referred to as creative, and that Ban-Ki Moon similarly pleads for 'creative

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<sup>133</sup> Lefebvre, *supra* note 36

solutions'. Further, the Committee would do well to honour its 2016 annual report abovementioned, to facilitate 'consultations with the administering Powers and other stakeholders regarding the status of the Non-Self-Governing Territories on the Committee's agenda'. Through this dialogue, those 'special circumstances' may emerge that are able to challenge the inelasticity of the categories.

## **5. Conclusion**

The Committee of 24 can no longer afford to maintain its current approach to decolonization, otherwise it stands accused for working against the very purpose of its creation, namely to advance the United Nations commitment to affording self-determination to extant colonial territories. There are therefore also issues of legitimacy at stake. As long as the Committee of 24 continues on its current trajectory, it risks greater enmity from listed territories and their administering powers; further distancing itself and the UN at large from its operative functions and goals. The UN's predilection toward the Spanish positions over Gibraltar requires review. The current approach of acceptance of the Spanish position which continues to deny the recognition of Gibraltar's right to self-determination also merits interrogation. The recognition of Gibraltar's right to self-determination is neither a discrete nor necessary precursor that would then enable the establishment of a new *sui generis* category. Rather, these two issues are intimately linked. Part of the Committee's, and the UN generally, problem of overcoming the partiality toward Spanish claims requires unsettling the ossification of their arguments as to its territorial integrity. There is a need to look at the issue with fresh eyes, rather than regurgitating old General Assembly resolutions. Giving primacy to Gibraltar's circumstances will unsettle the hardened assumptions over its status. Such an approach will facilitate the realisation of Ban Ki-Moon's vision.